Malayan Banking Bhd v Ng Sai Kang (as sole proprietor Tetuan Ng Sai Kang)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22NCC-195 OF 2011
MOHAMAD ARIFF J
20 JULY 2011

Civil Procedure — Summary judgment — Triable issues — Whether triable issues existed — Whether plaintiff failed to plead material facts about securities pledged to it — Whether mandatory in all loan recovery cases for bank to plead existence of securities and their realisation — Whether cause of action determined what was material to be pleaded

The plaintiff filed a summary judgment application under O 14 of the Rules of the High Court 1980 against the defendant for the amount owing under a restructured term loan facility under which the defendant had defaulted. The plaintiff had initially granted the defendant several credit facilities which were secured by a fixed deposit, assignments of two landed properties and a charge over a piece of land. At the defendant's request, the facilities were restructured and converted into a term loan. Subsequently a further restructuring of the term loan was done to reduce the monthly repayment amount over a longer settlement period. During both the restructuring exercises, the parties had agreed that apart from the defendant executing a supplemental facility agreement, the securities that had been originally pledged to the plaintiff would continue to be in force to secure the restructured term loan. Following the defendant's default, the plaintiff recalled the facility and after issuing letters of demand, first in the year 2007 and later in 2009, to all of which the defendant failed to respond, the plaintiff filed the instant action for recovery. Among the issues the defendant raised to oppose the summary judgment application was that the plaintiff had failed to plead material facts relating to the claim such as the securities that been pledged in its favour and what had become of them and the reason why the plaintiff's demand in 2009 was for a lesser amount than in its demand in 2007 and that accordingly, the claim was defective.

Held, allowing the application with costs:

(1) The issues raised by the defendant were without merit and did not extend beyond mere denials or were otherwise at odds with contemporaneous documents. The issues of law advanced were weak and without real merit. The defendant had failed to establish the necessary elements in relation to the advancing of triable issues (see para 11).

(2) It was not a mandatory requirement that in all loan recovery cases, the

bank must plead the securities and their realisation before the pleaded cause of action could be held sufficient and valid. Much depended on what precisely was the cause of action in the particular case at hand (see para 28).

(3) It was necessary to consider materiality in relation to cause of action. It might be a matter of prudence and prescient drafting to plead the securities and their realisation, but failure to do so need not constitute a fatal omission in all cases (see para 31).

[Bahasa Malaysia summary

Plaintif memfailkan permohonan penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap defendan untuk jumlah yang perlu dibayar di bawah kemudahan pinjaman berjangka yang disusun semula di mana defendan telah mengingkarinya. Plaintif pada mulanya memberikan defendan beberapa kemudahan kredit yang dijamin oleh deposit tetap, penyerahan hak dua harta bertanah dan caj ke atas sebidang tanah. Atas permintaan defendan, kemudahan-kemudahan disusun semula dan ditukarkan kepada pinjaman berjangka. Kemudiannya penyusunan semula pinjaman berjangka selanjutnya dibuat untuk mengurangkan jumlah bayaran balik bulanan terhadap tempoh penyelesaian yang panjang. Semasa kedua-dua pelaksanaan penyusunan semula tersebut, pihak-pihak telah bersetuju bahawa selain daripada melaksanakan perjanjian kemudahan tambahan, sekuriti-sekuriti yang telah disandarkan pada asalnya kepada plaintif akan berterusan berkuat kuasa untuk menjamin pinjaman berjangka yang disusun semula tersebut. Berikutan keingkaran defendan, plaintif menarik balik kemudahan dan selepas mengeluarkan surat-surat tuntutan, pertamanya pada tahun 2007 dan kemudiannya pada 2009, yang mana pada kesemuanya defendan gagal untuk menjawab, plaintif memfailkan tindakan ini untuk mendapatkannya semula. Antara isu-isu yang dibangkitkan oleh defendan untuk menentang permohonan penghakiman terus adalah bahawa plaintif gagal untuk memplid fakta material berkaitan tuntutan seperti sekuriti-sekuriti yang telah disandarkan bagi menyokongnya dan apa yang telah terjadi kepadanya dan alasan mengapa tuntutan plaintif pada 2009 adalah untuk jumlah yang kurang daripada tuntutannya pada 2007 dan oleh itu, tuntutan tersebut adalah cacat.

Diputuskan, membenarkan permohonan dengan kos:

(1) Isu-isu yang dibangkitkan oleh defendan adalah tanpa merit dan tidak berlanjutan melebihi penafian semata-mata atau sebaliknya ketidakmungkinan dengan dokumen-dokumen semasa. Isu-isu undang-undang yang dikemukakan adalah lemah dan tanpa merit yang jelas. Defendan telah gagal untuk membuktikan unsur-unsur yang perlu berkaitan pengemukaan isu-isu yang boleh dibicarakan (lihat perenggan 11).

(2) Ia bukan keperluan mandatori bahawa dalam kesemua kes-kes mendapatkan semula pinjaman, bank mesti memplid sekuriti-sekuriti dan realisasinya sebelum kausa tindakan yang diplidkan boleh diputuskan mencukupi dan sah. Kebanyakannya bergantung ke atas apa sebenarnya kausa tindakan tersebut dalam setiap kes tertentu (lihat perenggan 28).

(3) Ia adalah perlu untuk mempertimbangkan kematanan berkaitan kausa tindakan. Ia mungkin adalah perkara mendraf berhati-hati dan terus mata untuk memplid sekuriti-sekuriti dan merealisasikannya, tetapi kegagalan untuk berbuat demikian tidak perlu dianggap membentuk ketinggalan yang begitu menjejaskan dalam kesemua kes (lihat perenggan 31).]

Notes

For cases on triable issues, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8316–8423.

Cases referred to

Arab Malaysian Finance Bhd v Sukma Villa Sdn Bhd & Ors [2002] 1 CLJ 391, HC (folld)

Aseambankers Malaysia Bhd v Ong Wee Meng (Guaman No D1(D3)-22–1515 of 2005) (folld)

Adib bin Mokhtar & Ors v Jason Chan Chee Kong & Anor [1999] 2 MLJ 473, HC (refd)

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)

Gilbert Engineering Co Inc v Zainuddin Ahmad & Ors [2001] 7 CLJ 489, HC (refd)

Hadley v Baxendale (1854) 9 Exch 341 (refd)

Ho Weng Leong v Ng Kee Chin [1996] 5 MLJ 139, HC (refd)

Hsu Seng v Chai Soi Fua [1990] 1 MLJ 300, HC (refd)

Kang Kok Kwang v Bukit Baru Centre Sdn Bhd & Ors [1991] 2 CLJ (Rep) 789, HC (refd)

Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran [1986] 1 MLJ 418 (refd)

Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd [2001] 5 CLJ 371, HC (refd)

Selva Kumar a/l Murugiyah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)

Standard Chartered Bank Ltd v Walker and Another [1982] 3 All ER 938, CA (refd)

Superintendant of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)

United Malayan Banking Corporation Berhad v Palm and Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206, FC (refd)

A *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177, HC (refd)

Legislation referred to

Civil Law Act 1956 s 11(a)
B Contracts Act 1950 ss 26, 75
Rules of the High Court 1980 O 14, O18 r 7(1)

Mohamad Fauzi bin Abdul Samad (Chew Kar Meng, Zahardin & Partners)for the plaintiff.
C *Mohd Alakhir bin Brahim (Ong, Ma & Partners) for the defendant.*

Mohamad Ariff J:

D **[1]** In this O 14 summary judgment application, the plaintiff is claiming a sum of RM459,267.32 as at 31 March 2009, being the outstanding balance on the restructured term loan facility, together with interest thereon at the rate of 2% per year over the base lending rate of the plaintiff which was 5.5% per year
E as at 31 March 2009 at monthly rests from 1 April 2009, and an additional interest of 1% per year on the amount in arrears, subject to a minimum payment of RM5 per month, until the date of full payment or full settlement. The defendant is a sole proprietor. The material facts of the claim as they appear in the plaintiff's statement of claim show the following. By way of letter of offer
F dated 13 January 1997 the plaintiff granted to the defendant several banking facilities by way of credit facilities to the total amount of RM2,650,000. These facilities were granted on terms and conditions as contained in the plaintiff's letter of offer dated 13 January 1997. This letter of offer is exhibited as exh MBB1 in the supporting affidavit of the plaintiff. The securities in respect of
G these trade facilities are contained in the letter of offer stated above, and they are:

(a) fixed deposit of RM500,000 with interest to be capitalised;

(b) a loan agreement-cum-assignment dated 11 November 1997 over a piece
H of property described as No 15, Jalan 2/128, Happy Garden, 58200 Kuala Lumpur, whereby this property was absolutely assigned by the defendant and one Pang Ah Mooi to the plaintiff by way of security;

(c) a loan agreement-cum-assignment third party dated 11 November 1997
I over another piece of property described as No 16-1, Jalan 1/128, Happy Garden, 58200 Kuala Lumpur; and

(d) a first third party charge dated 10 November 1997 by which Pang Ah Mooi charged a third piece of land held under Grant No Hakmilik 3660, No Lot 10382, Mukim Petaling, Wilayah Persekutuan.

[2] All these securities are expressly pleaded by the plaintiff in the statement of claim. See para 5 of the statement of claim to this effect.

[3] Upon the defendant's request, the plaintiff restructured this facility by way of a letter of offer dated 27 June 2001. By this restructuring the facilities mentioned earlier were converted into a term loan of RM970,771.50. The term loan was repayable by RM30,000 per month over 38 months. This letter of offer dated 27 June 2001 expressly provided that the securities under the earlier trade facilities were to apply and be in force for the restructured facilities. Further, the defendant was required to execute a supplemental facility agreement for the sum of RM970,771.50. This supplemental facility agreement was executed on or about 3 April 2002.

[4] Upon request of the defendant again, the plaintiff by its letter of offer dated 1 June 2005 further restructured the term loan. The loan was now to be repaid by RM10,000 per month over 60 months. As for the first restructured facility, the securities mentioned earlier were to be accepted and be in force. Another supplemental facility agreement was executed dated 3 April 2002. The supplemental facility agreement dated 3 April 2002 was accepted as being in force.

[5] The defendant defaulted on the restructured facility and as a result of which the facility was recalled and the plaintiff sued for the sum of RM472,745.72 as at 31 August 2007, together with interest continuing thereafter. This first letter of demand is dated 14 September 2007 and 24 September 2007.

[6] Upon the defendant's failure to pay the sum demanded, plaintiff issued further letters of demand dated 25 May 2009 and 1 June 2009, to demand the total outstanding of RM459,267.32.32 together with interests thereon.

[7] The first defendant raises five issues which it argues as triable issues. The first issue concerns an allegation that no security documents were signed in respect of the letter of offer dated 27 June 2001, and since no security documents were signed, it is argued that the said agreement was without consideration and therefore void pursuant to s 26 of the Contracts Act 1950. The second issue relates to an alleged failure on the plaintiff's part to plead material facts regarding the security pledged in its favour. In this respect the defendant refers in particular to the upliftment of the fixed deposit of RM615,043.20 on 12 July 2000. The defendant submits that this was a material fact which should have pleaded but was never pleaded by the plaintiff in the statement of claim, and as such this omission renders the plaintiff's claim defective and could not be made good by way of affidavit evidence. The defendant relies on the Federal Court decision in *United Malayan Banking*

Corporation Berhad v Palm and Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206, for the proposition that the pleadings must include the security and any realisation of the security. The passage which is relied on by the defendant in this case reads:

> As we have said earlier the deposit of the shares as security was not disclosed in the statement of claim when the action was instituted. Nor was fact that the security had been realised in a series of sales of the shares … this omission the surprising, to say the least, and we cannot help but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence; *Gold Ores Reduction Company v Parr* where Matthew J said that 'it is most important that the defendant should know from the writ what the exact claim against him is …' Reference is also made to the Federal Court decision in national company for *Foreign Trade v Kayu Raya Bhd* [1984] 2 MLJ 300 .

[8] The third issue concerns the more general allegation that the plaintiff has failed to plead all the necessary material facts regarding the claim. In this regard the defendant refers to a fact that there were three letters of demand variously dated 14 September 2007, 24 September 2007, 25 May 2009 and 1 June 2009. The earlier letters of demand were for the sum of RM472,745.72 as at 31 August 2007. The second letters of demand were for the sum of RM459,267.32 as at 31 March 2009. The difference between the two is about RM13,478.40. According to the defendant, the plaintiff has not bothered to explain why the demand in 2009 was lesser than the demand in 2007. By this argument it is submitted that the plaintiff is required under the law to disclose and plead all material facts before being entitled to judgement. Failure to do so will render the plaintiff's claim and pleading defective and this will itself constitute a triable issue warranting the dismissal of the plaintiff's application for summary judgment.

[9] The fourth issue relates to a failure allegedly on the part of the plaintiff to produce the statement of account as required under the relevant agreements. Reference is made in this connection to cll 33 and 36 of the loan agreement cum assignment dated 11 November 1997 and the charge annexure dated 10 November 1997. Some attempt is made to relate this to an alleged plaintiff's duty of care to the defendant relying on the decision in *Standard Chartered Bank v Walker and Another* [1982] 3 All ER 938. The defendant questions the plaintiff's refusal to provide details and/or particulars on the amount being claimed.

[10] The last issue is one premised on s 75 for the Contracts Act 1950. It is argued that the plaintiff is not entitled to claim the continuing interest of 2%pa and the additional interest at 1% as claimed in the summary judgment application. The plaintiff has to prove its loss as required under s 75 of the Contracts Act. The Federal Court decision in *Selva Kumar a/l Murugiyah v*

Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 is cited in support of this argument to the effect that the plaintiff must prove its loss under s 75 before it can be regarded as entitled to claim any additional or penalty interest. Further, the defendant submits that the claim for interest for the plaintiff is tantamount to a claim for interest upon interest in contravention of s 11(a) of the Civil Law Act 1956, and as such it is unlawful and illegal.

[11] I have considered the affidavit in reply as well as the defence pleaded, and I find these issues raised by the defendant to be without merit and do not extend beyond mere denials or are otherwise at odds with the contemporaneous documents. This case concerns a banking transaction where the initial trade facilities have been restructured twice. The borrower is a sole proprietorship. It is difficult to accept he does not know the true nature of the facilities, the securities taken, the status of the securities or the exact amount owing to the bank. The issues of law advanced by the defendant are also weak and without real merit. It is an established principle in summary judgment applications that when the plaintiff has established a prima facie case, the burden shifts to the defendant to show it has triable issues in the sense of issues which should have at least some reasonable prospects of success, although the defendant does not require to prove its case at this stage. The defences raised must also be bona fide when tested against the evidence, and in this connection, the relevance of the contemporaneous documents becomes an important consideration for the court's assessment. The defendant here has failed to establish these necessary elements in relation to the advancing of triable issues.

[12] The first issue is clearly without merit, since the facility being sued presently is a restructured facility, and the documents make it crystal clear that the restructured facility was to continue to be based on the earlier securities, except the fixed deposit. Section 26 of the Contracts Act has no relevance whatsoever on the facts of this application, except as an interesting aside resting on imagined evidence. The defendant's argument appears to proceed on the basis that there were no security documents executed in respect of the restructured facility, and therefore void as being without consideration, since s 26 specifies:

> An Agreement made without consideration is void, unless —
>
> It is in writing and registered:
>
> (a) It is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other; Or is a promise to compensate for something done;
>
> (b) It is a promise to compensate, wholly or in part, a person who has voluntarily

done something for the promisor, or something which the promisor was legally compellable to do; Or is a promise to pay a debt barred by limitation law;

(c) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially auhorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suit.

In any of these cases, such an agreement is a contract.

[13] The defendant's argument in this regard is strange. Even if s 26 is applicable, which it is not, the documentary evidence gives the lie to this attempt to construct a feeble triable issue. Under the first restructured loan, there is an express supplemental facility agreement dated 3 April 2004 expressly executed by the parties, and cl 4 of this agreement states in no uncertain terms that the existing security documents would still be applicable. So does cl 6, reading:

> It is hereby agreed and declared that the existing security documents as varied and modified by this Agreement shall be and is expressed intended to remain a continuing security for all monies whatsoever now thereafter from time to time owing to the Bank by the Borrower whether alone or jointly and severally with another or others and whether this principle or surety notwithstanding that the Borrower may at any time all times cease to be indebted to the Bank for any period or periods and notwithstanding that the account or accounts of the Borrower with the Bank may from any cause whatsoever cease to be a current account or accounts and notwithstanding any settlement of account or accounts or otherwise.

[14] The present application relates to the second restructured loan facility whereby the repayment term of the loan was modified to become 60 equal monthly instalments of RM10,000 with effect from June 2005. Again, the relevant document is clear on this. I am here referring to the letter of offer dated 1 June 2005 where the following provisions on security appear:

> security:
>
> (a) Existing Third-Party First Legal Charge for RM2.65 million over the property held under them 3660, Lot No. 10382, Mukim Petaling, Daerah Kuala Lumpur and known as No. 512, Jalan Selesa, Happy Garden, Kuala Lumpur.
>
> (b) Existing Third-Party Loan Agreement Cum Assignment incorporating the Power of Attorney for RM2.6 5 million over a ground floor of a double story shophouse known as No. 15, Jalan 2/128, Taman Gembira, Jalan Kuchai Lama, Kuala Lumpur.
>
> (c) Existing Third-Party Loan Agreement Cum Assignment incorporating the Power of Attorney for RM2.65m over a 1st floor of a double storey shophouse known as No. 16-1, Jalan 1/128, Taman Gembira, Jalan Kuchai Lama, Kuala Lumpur.

(d) Existing Supplemental Agreement for RM970,771.50 dated 3/4/2002 on the existing three abovementioned properties.

[15] On the evidence, the fixed deposit had been uplifted as early as 12 July 2000, and credited into the defendant's overdraft account to reduce the outstanding amount owing. Thus as at the date of the second restructure, the amount had been reduced to RM436,453.14. The fixed deposit as security no longer appears in the letter of offer of 1 June 2005.

[16] The issue in relation to the fixed deposit has become irrelevant for purposes of this present claim. The second issue (failure to plead material particulars of securities taken and realisation of the securities) is therefore without merit. In this sense, it is strictly speaking unimportant to consider whether the principle in *United Malayan Banking Corporation Berhad v Palm and Vegetable Oils (M) Sdn Bhd & Ors*, has been breached, assuming it applies. I will return to this decision in more detail shortly, after considering the remaining three alleged triable issues.

[17] The remaining three issues relate to failure to supply particulars pertaining to the defendant's account and failure of the plaintiff to prove the loss it has suffered. This claim relates to banking law and practice, and as such the precise contractual relationship between the parties has first and foremost to be extracted from the governing documents. The plaintiff has shown the outstanding balance, and has produced a prominent 'Sijil Keberhutangan' signed by its duly authorised officer in which the sum outstanding on the term loan is stated as RM459,257.32 as at 31 March 2009 together with interest thereon at the prescribed rate and additional interest on the sum in arrears of 1% (or any other rate determined by the bank from time to time).

[18] The conclusive proof of indebtedness clause can be found clearly expressed in cll 33 and 36 of all three loan agreements cum assignment.

[19] By established case authority, it will be up to the defendant to now show manifest error or fraud. The defendant has utterly failed to do so.

[20] The fifth issue on s 75 of the Contracts Act and the Federal Court decision in *Selva Kumar*, it must be realised this decision is not in a banking case. The imposition of an additional interest of 1% on an amount in arrears in addition to the prescribed rate of interest, has become an normal aspect of banking transactions in the event a loan goes bad and is recalled. The High Court in *Arab Malaysian Finance Bhd v Sukma Villa Sdn Bhd & Ors* [2002] 1 CLJ 391 has appropriately considered the place of this 'additional' or 'penalty' interest in the following terms:

> In the case at hand the imposition of the increase in the margin interest cannot be said to be unreasonable, more so when it is within the permitted guidelines as laid down by Bank Negara. In the circumstances not only is it not unreasonable but also cannot be treated as a penalty (at p 394, per Syed Ahmad Helmy JC (as His Lordship then was).

[21] I am in full agreement with this sentiment and observation.

[22] As I have said earlier, the case of *Selva Kumar a/l Murugiyah v Thiagarajah a/l Retnasamy,* is not concerned with banking law, and as such will require to be examined in its proper context. I outline the facts in that case. The appellant and respondent in that case were medical practitioners. The appellant entered into an agreement in writing with the respondent whereby the respondent sold his clinic to the appellant for a total purchase price of RM120,000. Pursuant to the agreement, the appellant paid to the respondent RM12,000 on signing the agreement, and thereafter paid a further sum of RM48,000. The balance of RM60,000 was to be paid by 15 monthly instalments of RM4,000 each. However, at the stage when the appellant had paid up to a total sum of RM96,000 towards the total purchase price, he refused to go on paying the remaining six monthly instalments. The respondent sought to forfeit the RM96,000 by relying on a clause in the agreement which in effect, provided that if the appellant defaulted, all moneys paid to date of such breach would be forfeited absolutely to the respondent as agreed liquidated damages, and the agreement would be terminated. The High Court declared the clause was valid and enforceable. On appeal, which was allowed, the Federal Court ordered the refund of the sum of RM84,000 to the appellant. The Federal Court, relying on s 75 of the Contracts Act, held that in Malaysia no distinction is to be drawn between liquidated damages and penalties, and in every case the court must determine what is the reasonable compensation, and a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v Baxendale* (1854) 9 Exch 341. Any failure to prove such damages will result in the refusal of the court to award such damages.

[23] On the facts of this present application, the defendant is arguing just that — the bank must prove its damages and supply particulars.

[24] I think it is important to appreciate that banking transactions and banking disputes are grounded on comprehensive documents, and very often these documents provide contractual expression not only to the intention of the parties, but also to statutory rules and court decisions. As the law develops, so do the documents. Hence, a modern-day banking document will tend to be detailed and comprehensive, such that a resolution of a dispute, first and

foremost, will have to be tested against the applicable document or documents. Where the document provides for a conclusive evidence clause, such as present on the facts here, the general rule that in all cases the plaintiff must prove its damages, has accordingly to be given its appropriate meaning. The defendant cannot argue that despite the conclusive evidence clause, the plaintiff must still provide detailed particulars to prove its damages. Banking law is clear on this; a conclusive evidence certificate stands as good unless manifest error or fraud is proven by the defendant, or where the very validity of the loan is being challenged.

FAILURE TO PLEAD SECURITIES AND REALISATION THEREOF: *United Malayan Banking Corporation Berhad v Palm and Vegetable Oils (M) Sdn Bhd & Ors*

[25] In this application, the defendant's counsel has very diligently provided to this court numerous case authorities which have applied *United Malayan Banking Corporation Berhad v Palm and Vegetable Oils (M) Sdn Bhd & Ors*, in an effort to bolster the defendant's argument that the failure to expressly plead the upliftment of the fixed deposit was fatal to the summary judgment application. The list provided by counsel is long:

(a) *Adib bin Mokhtar & Ors v Jason Chan Chee Kong & Anor* [1999] 2 MLJ 473;

(b) *Gilbert Engineering Co, Inc v Zainuddin Ahmad & Ors* [2001] 7 CLJ 489;

(c) *Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran* [1986] 1 MLJ 418;

(d) *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177;

(e) *Hsu Seng v Chai Soi Fua* [1990] 1 MLJ 300;

(f) *Kang Kok Kwang v Bukit Baru Centre Sdn Bhd & Ors* [1991] 2 CLJ (Rep) 789;

(g) *Ho Weng Leong v Ng Kee Chin* [1996] 5 MLJ 139;

(h) *Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd* [2001] 5 CLJ 371;

(i) *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; and

(j) *Superintendant of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185.

[26] Except possibly for *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors*, the cases cited are not in the area of banking law, and hence have to

be approached accordingly. They all invariably reaffirm the general principle of pleadings that all material facts on which the party relies for his claim or defence must be pleaded, and as a corollary, any defect in the pleading cannot be cured by affidavit evidence. In other words, a party has to plead all material facts to support his cause of action or defence, as the case may be. This rule is now being extrapolated to become a party in a banking litigation, such as the bank, has to plead as material facts the fact of securities being taken, and the fact of the securities being realised.

[27] The general rule stems from O 18 r 7(1), which reads:

> Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

[28] The issue in a banking case then becomes whether it is a mandatory requirement that in all loan recovery cases the bank must plead the securities and their realisation, before the pleaded cause of action can be held sufficient and valid. With due respect, I do not believe such a position is wholly tenable, for much will depend on what precisely is the cause of action in the particular case at hand. These might be very material facts in relation to the particular cause of action or defence in a case such as *United Malayan Banking Corporation Berhad v Palm and Vegetable Oils (M) Sdn Bhd & Ors*, but may not necessarily hold true in another case, such as the present. A more detailed assessment of the facts of *United Malayan Banking Corporation Berhad v Palm and Vegetable Oils (M) Sdn Bhd & Ors* might be useful. These are the facts as they appear in the report.

[29] The appellant bank in that case claimed the amount outstanding on the loan granted to the first respondent and for which the other respondents gave letters of guarantee and indemnity. The appellant bank did not disclose in its statement of claim that the first respondent had lodged shares as security for the credit facilities. The shares were sold by the appellant after the commencement of the proceedings and it applied for summary judgment for the sum of RM3,490,113.26, after giving credit for the sum realised on the sale of the shares. The senior assistant registrar entered summary judgment for the appellant but this was set aside by the High Court judge on appeal. The learned judge gave the respondents unconditional leave to defend. The appellant bank appealed. Counsel for the respondents referred to three main issues (1) whether there had been any genuine sale of the shares deposited to third parties at arm's length with full credit given to the respondents of the proceeds; (2) whether a restructuring in 1978 included an agreement to determine the liability of the first respondent under the bills finance by transferring that to the fourth

respondent and (3) whether in April 1979 there was an informal scheme of arrangement including a temporary moratorium. It is thus evident that on the facts of that case, there were three serious issues raised, one of which related to the genuineness of the sale of the security shares.

[30] On these facts, the immediate materiality of the shares as security and their realisation become very apparent, and hence the pleadings require these to be pleaded. It was in this context that Raja Azlan Shah Ag LP (as His Highness then was) said:

> The short point that arises for determination in this appeal before us from the order of the learned judge is whether there are in the circumstances triable issues which justify leave to the respondents to defend this action. The respondents have raised a number of issues in their defence and Mr Millet on their behalf refers primarily to three main issues, namely, (1) whether there has been any genuine sale of the shares deposited to third parties at arm's length with full credit given to the respondents of the proceeds; (2) whether the restructuring in 1978 included an agreement to determine the liability of the first respondent under the bills finance by transfering that to the fourth respondent; and (3) whether in April 1979 there was an informal scheme of arrangement including a temporary moratorium.
>
> As we have said earlier the deposit of the shares as security was not disclosed in the statement of claim when the action was instituted nor was the fact that the security had been realised in a series of sales of the shares between January and September 1980, and these matters were only disclosed for the first time in June 1981 in the affidavit in support of the O 14 summons. This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co v Parr* [1892] 2 QB 14 where Mathew J, said that 'it is most important that a defendant should know from the writ what the exact claim against him is'. The respondents also complain of the timing of the sale and the price realised and we would on this aspect refer to *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd* [1971] Ch 949 (which was applied in *Duke v Robson* All ER 481, 488) that the duty of a mortgagee to a mortgagor when exercising his power of sale is to take reasonable care to obtain a proper price, a duty which has since been extended by the English Court of Appeal to guarantors as well in *Standard Chartered Bank v Walker & Anor* dated 21 June 1982. We would add that even after the sale of the shares there was and has been no attempt to amend the statement of claim to reflect the true position.

[31] Can the same be said on the facts of this present application? I do not think so. It is necessary to consider materiality in relation to the cause of action here. The existence of the fixed deposit as security has become irrelevant to the cause of action which is grounded on the second restructured facility, which, as I have highlighted earlier, no longer includes the fixed deposit as security, for the simple reason it has been uplifted much earlier. Thus, whether the security or securities taken have to be pleaded or otherwise, must depend on the precise cause of action in the particular case. It might be a matter of prudence and

prescient drafting to plead the securities and their realisation, but failure to do so need not constitute a fatal omission in all cases.

[32] In the course of submission, the plaintiff's counsel adduced a fairly recent decision of the High Court in *Aseambankers Malaysia Bhd v Ong Wee Meng* (Guaman No D1(D3)-22–1515 of 2005), where Her Ladyship Nallini Pathmanathan J stated:

> There is no requirement in law that the plaintiff has to plead the fact that a sum of RM1.8m was deposited with it as a prerequisite or pre-condition to the utilisation of the margin financing facility. While it is the relevant fact, it does not in my opinion contravene rules of pleadings which require that material facts only be pleaded. A perusal of the statement of claim in the instant case discloses that all material facts namely the opening of the margin facility account, the utilisation of the account, the default, the force sale and the quantum due, which comprise the bedrock of the plaintiff's claim have been fully pleaded. As such the contention that the claim is in some way defective and fatally so, is misconceived. It may well be the case that the addition of the fact of the deposit of the RM1.8m would have contributed to the fuller statement of claim. But the failure to plead the deposit of RM1.8m in itself does not amount to a triable issue. *UMBC v Palm & Vegetable Oils* is authority for the proposition that any defect or omission in the statement of claim cannot be made good by affidavit evidence. However it is not authority for the proposition that the failure to plead the fact of the deposit of the security as in the instant case, is in itself sufficient to render the claim defective.

[33] I am in full agreement with the views expressed by Nallini Pathmnathan J and respectfully adopt the same.

CONCLUSION

[34] Thus, for the various reasons elaborated above I am of the view that there are no triable issues raised in this case by the defendant, such that this is a fit and proper case for summary judgment to be entered for the plaintiff applicant, in terms of encl 5, with costs.

Application allowed with costs.

Reported by Ashok Kumar